

(1) The doctrine of frustration, as statutorily recognized by s 57(2) of the Contracts Act 1950 ('the Act'), was applicable in this case. The acquisition of the land had radically changed the obligation of the respondent to sell her ½ share of the land to the appellant, as what was agreed and intended by the parties and affirmed by the agreement was a transfer of a ½ share of the land from the respondent to the appellant by way of a sale (see p 673A–G);

*Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257 followed. A

- (2) When the land was compulsorily acquired and compensation awarded, the subject matter of the agreement ceased to exist and performance of the agreement became impossible. For that reason, the compulsory acquisition of the land had frustrated the agreement so as to discharge both the appellant and the respondent of their obligations under the agreement (see p 673H); *Lim Kim Soon v Sheriffa Taribah bte Abdul Rahman* [1994] 1 SLR 393 followed. B

- (3) Since the subject matter of the agreement had been taken away and replaced by way of compensation, the appellant could not claim such compensation as being due and payable to him because the basis of the appellant's claim was dependent on the agreement. Since the agreement was void under s 57(2) of the Act, the appellant could not claim any right to such compensation. At most, under s 66 of the Act he was entitled to be refunded the 10% deposit he had paid to the respondent (see p 674B-D). C D

#### Obiter:

The agreement could be enforced in March 1980 where the subject matter had been reduced by the kadi's certificate, and the respondent could only sell her own beneficial interest of a  $\frac{1}{4}$  share, if the parties agree to sell and purchase a reduced portion of the land with a corresponding reduction in price and by agreeing to do so, vary the agreement (see p 672D-E). E

#### [Bahasa Malaysia summary]

Perayu adalah pemunya berdaftar  $\frac{1}{2}$  bahagian dalam sebidang tanah ('tanah tersebut'). Setengah bahagian lainnya membentuk aset kepada estet seorang Hatijah bte Hj Jusoh ('si mati'). Pada bulan Disember 1979, penentang — dalam keupayaannya sebagai pentadbir estet si mati — mengikat suatu perjanjian jual beli dengan perayu untuk menjual  $\frac{1}{2}$  bahagian kepunyaan si mati dalam tanah tersebut pada harga belian sebanyak RM40,000 ('perjanjian tersebut'). Perayu membayar kepada penentang RM4,000 yang merupakan 10% daripada harga belian. Pada bulan Mac 1980, sivil feraid dikeluarkan membahagikan  $\frac{1}{2}$  bahagian tanah tersebut dalam estet si mati kepada penentang dan baitulmal dalam perkadaran  $\frac{1}{2}$  bahagian masing-masing, yang menyebabkan penentang dan baitulmal mendapat  $\frac{1}{4}$  bahagian masing-masing dalam tanah tersebut. Pada bulan Mei 1994, keseluruhan tanah tersebut telah diambil oleh kerajaan. Pampasan telah diberikan kepada perayu untuk  $\frac{1}{2}$  bahagiannya dalam tanah tersebut, dan kepada penentang untuk  $\frac{1}{4}$  bahagiannya dalam tanah tersebut. Perayu memfailkan permohonan menuntut pampasan yang perlu dibayar kepada penentang ditolak baki harga beli yang perlu dibayar di bawah perjanjian tersebut. Penentang menegaskan bahawa perjanjian tersebut telah terkecewa F G H I

- A oleh sebab pengambilan wajib keseluruhan tanah tersebut oleh kerajaan, dan adalah mustahil untuk melaksanakan perjanjian tersebut. Hakim perbicaraan menyokong penegasan ini dan memerintahkan bahawa pampasan yang perlu dibayar kepada penentang untuk  $\frac{1}{4}$  bahagiannya dalam tanah tersebut dibayar kepada beliau, ditolak
- B jumlah sebanyak RM4,000 yang merupakan 10% deposit untuk dikembalikan kepada perayu. Perayu membuat rayuan. Isu utama yang dibangkitkan dalam rayuan ini adalah sama ada doktrin kekecewaan terpakai untuk membebaskan pihak-pihak daripada obligasi-obligasi di bawah perjanjian tersebut.
- C **Diputuskan**, menolak rayuan:
- (1) Doktrin kekecewaan, seperti yang diiktirafkan secara statutori oleh s 57(2) Akta Kontrak 1950 ('Akta tersebut'), adalah terpakai dalam kes ini. Pengambilan tanah itu telah secara radikal mengubah obligasi penentang untuk menjual  $\frac{1}{2}$  bahagian tanah
- D tersebut kepada perayu, kerana apa yang dipersetujui dan diniatkan oleh pihak-pihak dan disahkan oleh perjanjian tersebut adalah pindahmilik  $\frac{1}{2}$  bahagian tanah tersebut daripada penentang kepada perayu dengan cara jualan (lihat ms 673A-G); *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257 diikuti.
- E (2) Apabila tanah tersebut diambil secara wajib dan pampasan diberikan, perkara subjek perjanjian tersebut tidak wujud lagi dan pelaksanaan perjanjian tersebut menjadi mustahil. Oleh sebab itu, pengambilan wajib tanah tersebut telah mengecewakan
- F perjanjian tersebut dan membebaskan kedua-dua perayu dan penentang daripada obligasi-obligasi mereka di bawah perjanjian tersebut (lihat ms 673H); *Lim Kim Soon v Sheriffa Taribah bte Abdul Rahman* [1994] 1 SLR 393 diikuti.
- G (3) Oleh kerana perkara subjek perjanjian tersebut telah diambil dan diganti dengan cara pampasan, perayu tidak boleh menuntut pampasan itu sebagai terhutang dan perlu dibayar kepada beliau kerana asas tuntutan perayu adalah bergantung kepada perjanjian tersebut. Oleh kerana perjanjian tersebut adalah terbatal di bawah s 57(2) Akta tersebut, perayu tidak boleh menuntut apa-apa hak ke atas pampasan itu. Di bawah s 66 Akta tersebut, beliau hanya
- H berhak untuk dikembalikan 10% deposit yang beliau bayar kepada penentang (lihat ms 674B-D).

**Obiter:**

- I Perjanjian tersebut boleh dikuatkuasakan pada bulan Mac 1980 di mana perkara subjek telah dikurangkan oleh sijil feraiid, dan penentang hanya boleh menjual kepentingan benefisialnya sebanyak  $\frac{1}{4}$  bahagian, jika pihak-pihak bersetuju untuk menjual dan membeli bahagian tanah tersebut yang dikurangkan dengan harga beli yang turut

dikurangkan, dan dengan bersetuju untuk berbuat demikian, mengubah perjanjian tersebut (lihat ms 672D-E).]

[*Editorial Note*: The appellant has applied for leave to appeal to the Federal Court vide Civil Application No 08-62-96(P).]

### Notes

For cases on frustration of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1604-1620.

### Cases referred to

*Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257  
*Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR 393

### Legislation referred to

Contracts Act 1950 ss 32, 33, 57(2)

**Appeal from:** Originating Summons No 24-624-94 (High Court, Pulau Pinang)

*Goik Kenzin (Malik & Partners)* for the appellant.  
*Lim Chee Wee (Skrine & Co)* for the respondent.

*Cur Adv Vult*

**Siti Norma Yaakob JCA** (delivering the judgment of the court): The principal issue raised in this appeal is whether the doctrine of frustration applies as to discharge the parties in these proceedings from their obligations under the sale and purchase agreement entered into between them. That issue arose from the following undisputed facts.

On 28 August 1974, the appellant became the registered proprietor of a  $\frac{1}{2}$  share in land held under Lot 569, GM 26, Mukim 7, Seberang Perai Tengah, Penang ('the land'). The other  $\frac{1}{2}$  share formed the only asset of the estate of one Hatijah bte Hj Jusoh ('the deceased') who died on 17 June 1924. The estate was administered by the deceased's husband, one Mat bin Musa, but when he died on 12 December 1945 without fully administering the deceased's estate, the respondent, being the sole beneficiary, took over the administration of the estate on 24 July 1975, and it was in her capacity as the administratrix of the deceased's estate that the respondent entered into a sale and purchase agreement dated 19 December 1979 with the appellant to sell the deceased's  $\frac{1}{2}$  share of the land to the appellant ('the agreement'). By this sale, the appellant stood to be the proprietor of the whole land which covers an area of 4.5805 acres.

The agreement was subject to, inter alia, the following terms and conditions:

- A (1) Paragraph (c) of the preamble imposed an obligation to obtain a kadi's certificate to determine the persons entitled to share the estate and to their respective entitlements;
- (2) Clause 1 fixed the purchase price at RM40,000 of which RM4,000 representing 10% of the purchase price was paid by the appellant to the respondent at the time the agreement was executed; and
- B (3) Clause 2 provided for the balance of the purchase price of RM36,000 to be paid by the appellant within a period of two calendar months from the date of receipt of the notice by the appellant that an order of court sanctioning the sale had been granted to the respondent.
- C The obtaining of the order sanctioning the sale is again emphasized in cl 4(e) of the agreement as being one of the pre-conditions of the sale, and it was pursuant to this pre-condition that the respondent — as the administratrix of the deceased's estate — filed Originating Summons No 633 of 1979 in the Penang High Court on 21 December 1979, seeking
- D leave to enforce the agreement by the sale of the deceased's  $\frac{1}{2}$  share of the land to the appellant.

Nothing came of this application as subsequent events show that the application in its original form could not be proceeded with.

- E On 7 March 1980, the Kadi Besar Penang acting under s 43 of the Administration of Muslim Law Enactment 1959 (since repealed), issued a 'sijil feraid' distributing the  $\frac{1}{2}$  share of the land in the estate of the deceased to the respondent and baitulmal in the proportion of a  $\frac{1}{2}$  share each. This meant that in respect of the whole land, the respondent was entitled to  $\frac{1}{4}$  share beneficially, whilst the other  $\frac{1}{4}$  went to baitulmal.

- F The effect of the 'sijil feraid' or kadi's certificate was to disable the respondent from fulfilling her obligation under the agreement to sell the deceased's  $\frac{1}{2}$  share of the land to the appellant. This led to numerous correspondence and meetings between the parties and the Religious Department in attempts to enforce the agreement. The appellant offered to purchase baitulmal's  $\frac{1}{4}$  share of the land, but this sale never took place
- G as the appellant considered the value of RM153,000 asked for by the Religious Department to be exorbitant and prohibitive. On the other hand, the Religious Department was prepared to purchase the respondent's  $\frac{1}{4}$  share of the land for RM20,000, but this offer too was not taken up by the respondent. After that all attempts at a compromise with the Religious
- H Department failed and the matter became a stalemate.

Up to 1991, no further action was taken on the matter until 20 February of the same year when the respondent obtained a court order vesting the  $\frac{1}{4}$  share of the land to her beneficially.

- I Then on 24 November 1992, the Religious Department wrote to the respondent requesting her as the administratrix of the deceased's estate to obtain a court order to vest the other  $\frac{1}{4}$  share of the land into the name of the Council of Muslim Religion, State of Penang in line with the 'sijil feraid'. This was not done and the situation remained the same until May

1994 when the whole land was acquired by the government, and acting under s 14(1) of the Land Acquisition Act 1960, the Collector of Land Revenue, Daerah Seberang Perai Tengah ('the collector') awarded the following compensation to the persons entitled thereto: A

- (1) RM194,628 to the appellant for his  $\frac{1}{2}$  share of the land.
- (2) RM97,314 to the respondent for her  $\frac{1}{4}$  share of the land. B
- (3) RM97,314 to the respondent as the administratrix of the estate of the deceased, for the other  $\frac{1}{4}$  share of the land.

The appellant accepted the compensation for his  $\frac{1}{2}$  share of the land, but since he was also making a claim under the agreement for the compensation payable to the respondent in her capacity as the beneficiary as well as the administratrix, the collector — by way of Originating Summons No 24-624-94 filed in the High Court at Penang — deposited the two sums of compensation payable to the respondent into court pursuant to s 29(2) of the Land Acquisition Act 1960. C

In 1995, both the appellant and the respondent filed separate applications in the same originating summons praying for almost identical reliefs. They are: D

- (1) for leave to intervene in the proceedings;
- (2) for an order that the two sums totalling RM194,628 paid into court by the collector be paid out to them as the persons entitled thereto; and E
- (3) in the case of the appellant, a sum of RM36,000 be paid out from the sums deposited to the respondent, this amount being the balance of the purchase price due under cl 2 of the agreement. F

It is clear from these two applications that both the appellant and the respondent consider themselves to be the persons entitled to receive the two sums and this dispute was resolved on 16 June 1995 when Yaakob Ismail J:

- (1) allowed the respondent's application with costs and ordered that the deposited sum of RM97,314 being the compensation payable to her for her  $\frac{1}{4}$  share of the land, be paid out to her less the sum of RM4,000 to be refunded to the appellant. This RM4,000 represented the 10% deposit paid to the respondent by the appellant pursuant to cl 1 of the agreement; and G
- (2) allowed the appellant to intervene, but dismissed his claim to the deposited sums with costs as the two sums belong to the respondent and baitulmal as compensation for their  $\frac{1}{4}$  share each in the land. H

It is to appeal against this order that the parties came before us.

At the outset of the appeal, counsel for the appellant reiterated that his client is only claiming for the compensation due to the respondent beneficially less the balance of the purchase price of RM36,000 for the  $\frac{1}{4}$  share and not to the amount awarded to her as the administratrix, as that amount rightly belongs to baitulmal. The appellant took the stand I

- A that the agreement is still valid and subsisting despite the respondent's failure to obtain a court order sanctioning the sale and despite the fact that the whole land in question had since been compulsorily acquired by the government. He argued further that the fact of the acquisition had not displaced his entitlement to the compensation awarded as the respondent
- B held such compensation as a trustee for him less the balance of the purchase price due. By way of a rebuttal, he maintained that the act of acquiring the whole land compulsorily had not frustrated the agreement as he was not claiming specific performance of the agreement. In this respect, it is not disputed that the appellant had on 31 May 1994, sued the respondent for, inter alia, specific performance of the agreement in Civil
- C Suit No S2-22-297-94, but the suit was discontinued on 14 December 1994.

A perusal of the agreement in its entirety shows it to be a contingent agreement, as cl 4(e) contains the following provisions:

- D 4 The sale and purchase agreement shall be subject to:
- (a) .....
  - (b) .....
  - (c) .....
  - (d) .....
  - E (e) The order of court sanctioning the sale hereto shall have been obtained by the vendor in favour of the purchaser or his nominee.
  - (f) .....

- In addition, there is also an obligation — no doubt by virtue of the estate being a Muslim estate — to obtain a kadi's certificate as to the distribution of the land, and this is clear from para (c) of the preamble to the agreement which states as follows:
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Whereas:

- (a) .....
- G (b) .....
- (c) The said Hatijah bte Hj Jusoh died on 17 June 1924, an application will have to be made for a kadi's certificate relating to the distribution of the asset.

- A contingent contract has been defined by s 32 of the Contracts Act 1950 ('the Act') to be 'a contract to do or not to do something, if some event collateral to the contract, does or does not happen'. The effect of such a contract is stated by s 33 of the Act to be as follows:
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- 33 (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
- I (b) If the event becomes impossible such contracts become void.

In this case, there were two events that needed to be accomplished. The first was the obtaining of the kadi's certificate, and the second the obtaining

of the court order sanctioning the sale. Both obligations either expressly or impliedly were to be initiated by the respondent. A

The kadi's certificate or 'sijil feraid' dated 7 March 1980 was obtained, but then the manner of distribution prevented the sale of the deceased's  $\frac{1}{2}$  share in terms of the agreement as baitulmal was identified as a beneficiary together with the respondent, and entitled to share equally with the respondent the  $\frac{1}{2}$  share of the land belonging to the estate. By the very presence of this pre-condition in the agreement, the parties must have contemplated that the deceased's  $\frac{1}{2}$  share would vest entirely with the respondent — the sole heir and beneficiary — thereby empowering her to sell the entire  $\frac{1}{2}$  share to the appellant. However, the parties failed to appreciate that as the sole female heir of a Muslim estate, the respondent is not entitled to the entire  $\frac{1}{2}$  share of the deceased's property exclusively under Muslim law, and in the absence of a male heir, the  $\frac{1}{2}$  share was apportioned equally with baitulmal. B C

The question that arises from this is whether the agreement can be enforced in March 1980 given the situation that the subject matter has been reduced by the kadi's certificate as the respondent can only sell her own beneficial interest of a  $\frac{1}{4}$  share. We answer this positively if the parties agree to sell and purchase a reduced portion of the land with a corresponding reduction in price, and by agreeing to do so, vary the agreement. However, the conduct of the appellant in attempting to purchase baitulmal's  $\frac{1}{4}$  share strongly indicates that he was not prepared to settle for something less and was intent in acquiring the whole  $\frac{1}{2}$  share for himself. It was only during the hearing in the court below and before us that he indicated he was prepared to purchase a lesser portion of the land. Can he opt to do that? To answer this, we have to look at the agreement, particularly the provisions relating to the other pre-condition to be fulfilled, this being the obtaining of the court order sanctioning the sale. D E F

The respondent never obtained that court order and we consider that this omission was not due to lack of trying. She responded to her obligation quickly enough by filing the originating summons to obtain the leave to sell the land in 1979, but further proceedings were thwarted by: G

- (1) the contents of the kadi's certificate issued in March 1980 which reduced the land capable of being sold;
- (2) the attempts at trying to reach a compromise to ensure that the agreement could be specifically enforced. This included negotiations to get baitulmal to agree to sell its  $\frac{1}{4}$  share at a price acceptable to the appellant; and H
- (3) the compulsory acquisition of the whole land which commenced on 11 November 1993 when the preliminary notice, Form A, issued under s 4 of the Land Acquisition Act 1960 was gazetted. This sealed the fate of the agreement, as the respondent contended that it has been frustrated on the grounds that it was impossible to perform, a contention that was upheld by the trial judge. I

- A The doctrine of frustration which has since received statutory recognition in s 57(2) of the Act reads as follows:

A contract to do any act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

B

Visu Sinnadurai in his book on the *Law of Contract in Malaysia and Singapore — Cases and Commentary*, had this to say when dealing with the doctrine of frustration at p 487:

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The Act does not define the word 'impossible'. However, it appears that the wording of the section envisages two main instances of frustration — when a contract to do an act becomes: (a) impossible; or (b) unlawful. It is clear that the frustration should be supervening and subsequent to the formation of the contract. Furthermore, it should be some event which the promisor could not prevent, as a 'self-induced frustration' does not discharge a party of his contractual obligation.

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The applicability of the doctrine was also discussed in the case of *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257 where at p 262, the Federal Court after referring to a number of English authorities, expressed its views of the doctrine in the following manner:

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In short, it would appear that where after a contract has been entered into there is a change of circumstances, but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

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Applying that test, it is clear that the compulsory acquisition that occurred in the instant case took place 14 years after the agreement was executed — an event that could not have been contemplated by the parties.

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We next ask ourselves whether the acquisition of the land had radically changed the obligation of the respondent to sell the  $\frac{1}{2}$  share of the land to the appellant. We answer this in the affirmative, as what was agreed and intended by the parties and affirmed by the agreement is a transfer of a  $\frac{1}{2}$  share of the land from the respondent to the appellant by way of a sale. When the land was compulsorily acquired and compensation awarded, the subject matter of the agreement ceased to exist and performance of the

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agreement became impossible. For that reason, we consider that the compulsory acquisition of the land had frustrated the agreement so as to discharge both the appellant and the respondent of their obligations under the agreement. That same issue was raised in the Singapore case of *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR 393 and when invoking the doctrine of frustration, LP Thean JA had this to say (at

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p 409):

In our judgment (adopting the words of Lord Radcliffe [in *Davis Contractors v Fareham Urban District Council* [1956] AC 696 at p 729]) the occurrence of the unexpected event, ie the commencement of the process of compulsory

acquisition, had altered fundamentally the 'face of things' and there was such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. In our judgment, this case is an appropriate one for the invocation of the doctrine.

Likewise, since the subject matter of the agreement before us has been taken away and replaced by way of compensation payable, can the appellant claim such compensation as being due and payable to him? We say 'no' for the very reason that the basis of the appellant's claim is dependent on the agreement, but since we have already ruled that such an agreement is now void under s 57(2) of the Act, the respondent cannot claim any right to such compensation. At most, he is entitled to be refunded the 10% deposit he had paid to the respondent under s 66 of the Act which provides that any person who has received an advantage under an agreement which is later discovered to be void is obliged to return such advantage or compensate for it to the person he received it. It is for this reason that the appellant is entitled to be refunded the 10% deposit he had made to the respondent pursuant to cl 1 of the agreement.

For the reasons that we have given, we had dismissed this appeal with costs, affirmed the decision of the High Court and ordered that the deposit for costs made by the appellant be paid to the respondent to account of her taxed costs.

*Appeal dismissed.*

Reported by Jafisah Jaafar

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